

9/20/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 11
GFR

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sun Management Services, Inc.

Serial No. 75/735,772

Gregg Emch of Emch, Schaffer, Schaub & Porcello Co., L.P.A.
for Sun Management Services, Inc.

Amy C. Page and Tarah K. Hardy, Trademark Examining
Attorneys, Law Office 110 (Chris A.F. Pedersen, Managing
Attorney).

Before Cissel, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Sun Management Services, Inc. has filed an application
to register the mark CHIEF for supermarket store services.¹
The Examining Attorney refused registration of applicant's
mark under Section 2(d) of the Lanham Act, 15 U.S.C.
§1052(d), because of the prior registration of CHIEF for

¹ Serial No. 75/735,772, filed June 23, 1999, asserting
applicant's first use and first use of the mark in commerce as of
March 4, 1951.

Ser No. 75/735,772

"spices and seasoning; namely, curry powder, ground massala, amchar massala, baking powder, geera, roasted geera, saffron, tandoori massala, whole grain massala, garlic salt, celery salt, poultry seasoning, black pepper, white pepper, meat tenderizer, garlic powder, onion powder, jerk seasoning, seafood seasoning, Chinese seasoning powder, steak seasoning powder, paprika and cocoa."²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested.

It is the Examining Attorney's position that registration must be refused under Section 2(d) because there is a likelihood that consumers of the respective goods and services would be confused or mistaken as to their source or sponsorship, when the goods or services are marketed contemporaneously under the respective marks. Applicant contends there is no likelihood of confusion or mistake.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

² Registration No. 1,871,487 issued to C.B.P. Limited, a corporation of Trinidad and Tobago, January 3, 1995, and lists 1962 as a date of first use and 1963 as a date of first use of the mark in commerce. Section 8 and 15 affidavits accepted and acknowledged, respectively, April 6, 2001.

Ser No. 75/735,772

relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In our analysis of likelihood of confusion, and in view of the record in this case, key considerations are that the marks are exactly the same, the goods and services are related, and the consumers for these goods and services are presumed to overlap. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

In regard to the marks, both are the single word CHIEF in typed form, i.e., neither mark is limited to any particular form of lettering and the marks do not include any particular design elements which might distinguish them. For purposes of our Section 2(d) analysis, we must consider that both marks could be set forth in exactly the same form of lettering. *Phillips Petroleum Co. v. C. J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971); *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992). Thus, the marks are identical in sight and sound and, presumptively, meaning. Indeed, applicant makes no argument that the marks are in any way different.

It is well settled that when the marks are identical, the involved goods or services need not be as close in order to support a refusal of registration under Section

2(d). *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983) ("If the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion.") It is equally well settled that goods or services need not be identical or competitive to support a finding of likelihood of confusion. It is sufficient if the goods or services are related in some way or the circumstances of their marketing are such that they would be encountered by the same persons, even if not contemporaneously, who would, because of the marks, mistakenly conclude that the goods or services are in some way associated with the same producer, or that there is an association between the producers. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Applicant admits its sells seasonings and spices in its supermarkets. In addition, the Examining Attorney has made of record numerous third-party registrations showing that the same mark has been registered for both supermarket or grocery store services and for, among other wares, spices. Third-party registrations which cover a number of differing goods and/or services, and which are based on use

Ser No. 75/735,772

in commerce, although not evidence that the marks shown therein are in use in commerce or that the public is familiar with them, may nevertheless have probative value to the extent that they serve to suggest that such goods or services are of a type which may emanate from a single source. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986).

In addition, our reviewing court has noted, in a case which similarly required a comparison of goods and services involving sale of such goods, that "trademarks for goods find their principal use in connection with selling the goods and ... the applicant's services are general merchandising--that is to say selling--services... The respective marks will have their only impact on the purchasing public in the same marketplace." *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 464, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

All of this reveals that there is a sufficient relationship between the goods and services that, when they are marketed under identical marks, confusion or mistake is likely. Applicant argues to the contrary, asserting that its stores do not market private label products and do not market registrant's products, so that no CHIEF-branded

spices of any type will be found in applicant's stores. Moreover, applicant argues, purchasers encountering registrant's products in other stores would not believe there is any association with applicant, "when Applicant does not sell any private-branded products." These, however, are mere arguments unsupported by anything in the record. Moreover, even if we were to find some support for these arguments in the record, we agree with the Examining Attorney that there is a likelihood of confusion because the goods and services are marketed to the same classes of consumers under circumstances in which confusion is likely. Contrary to applicant's conclusion, it is not necessary that registrant's goods be sold in applicant's stores for a likelihood of confusion to exist. For example, if consumers encountering ads for registrant's products were to seek them in applicant's stores, confusion would be shown.

Applicant also argues that there are numerous third-party registrations for marks incorporating the term "Chief" covering various types of food products, so that "the scope of protection available for any mark including the term CHIEF has already been greatly narrowed." Applicant has not, however, entered copies of these registrations into the record. Thus, we have no idea of

the status of, or title to, these registrations, or whether they are based on use in commerce of the marks applicant lists, or even the forms of display of the marks. Third-party registrations are of little value in determining likelihood of confusion, since they are not proof that consumers are familiar with the marks therein and therefore accustomed to the existence of similar marks in the marketplace. *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Even if we had considered the referenced registrations, we note that their probative value would be further limited because none is alleged to be for the mark CHIEF alone and none is for grocery or supermarket services or spices and seasonings.³

Finally, applicant argues that "the most important factor involved in this appeal" is that registrant and applicant have been concurrently using CHIEF as a mark for their respective goods and services "since 1963 without

³ Applicant does assert that there is one registration for the mark TAIPAN for, among other items, a "5 spice powder"; that these goods are equivalent to one of the cited registrant's goods, i.e., "Chinese seasoning powder"; that TAIPAN translates to "chief" and therefore, under the doctrine of foreign equivalents, TAIPAN for "5 spice powder" should not be registrable over CHIEF for "Chinese seasoning powder"; and that since TAIPAN has been registered over CHIEF, applicant's mark should not be barred from registration by the cited mark.

Applicant has not, however, provided a copy of the registration, or entered anything into the record to support the translation or the asserted equivalence of "5 spice powder" and "Chinese seasoning powder."

appellant being aware of any actual confusion." The asserted absence of actual confusion is, however, not determinative of the question of likelihood of confusion, for a number of reasons. First, we have only applicant's "version of the marketplace" and "we do not really know the conditions in the marketplace since the picture painted by applicant is incomplete..." *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1473 (TTAB 1994); see also *In re Wilson*, 57 USPQ2d 1863, 1869 (TTAB 2001). Second, registrant appears to be located outside the United States, in Trinidad and Tobago, while applicant, by its own argument, runs only 7 stores in northwest Ohio. Thus, despite the overlapping years of use, there may have been no meaningful opportunity for actual confusion to occur in the marketplace. Cf. *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209, 1212 (TTAB 1999); see also, *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Third, in view of the relatively inexpensive nature of registrant's goods, it may be that even confused purchasers would not take the trouble to inform either of the trademark owners. *Azteca, supra*, 50 USPQ2d at 1212 (TTAB 1999). Moreover, it is unnecessary to show actual confusion in establishing likelihood of confusion. *In re*

Ser No. 75/735,772

Marriott Corp., 517 F.2d 1364, 1368, 186 USPQ 218, 221-222
(CCPA 1975).

In sum, the marks are identical and the goods and services are related and marketed to the same classes of consumers, so that there exists a likelihood of confusion.

Decision: The refusal to register is affirmed.